

**FREQUENTLY ASKED QUESTIONS ON  
THE NOTICE OF PROPOSED RULEMAKING FOR  
PROCEDURES FOR REESTABLISHING A GOVERNMENT-TO-GOVERNMENT  
RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY**

**SEPTEMBER 2015**

**What does the proposed rule say?**

The Notice of Proposed Rulemaking (“proposed rule”) would create a path for a reorganized Native Hawaiian government to reestablish a government-to-government relationship with the United States. The proposed rule would establish an administrative procedure and criteria that the Secretary of the Interior would apply if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States.

The decision to reorganize a Native Hawaiian government and to reestablish a formal government-to-government relationship with the United States is a decision for the Native Hawaiian community. Therefore, the proposed rule does not attempt to reorganize a Native Hawaiian government or dictate the form or structure of that government.

**Why did the Department decide to move forward with a proposed rule?**

After reviewing more than 5,000 comments submitted for the written record, and over 40 hours of testimony received during the Federal consultations in Hawaii in 2014 on the Advance Notice of Proposed Rulemaking, the Department found that the public commenters overwhelmingly supported creating a pathway for reestablishing a formal government-to-government relationship between the Native Hawaiian community and the United States, as the next step in the reconciliation process set in motion by Federal law (the Apology Resolution) over 20 years ago. The Department believes that reestablishing such a relationship would allow the United States to more effectively implement the special political and trust relationship that Congress has long recognized with the Native Hawaiian community.

**How did the Department arrive at its decision to move forward with a proposed rule?**

The Department of the Interior is the lead Federal agency on Native Hawaiian affairs. It applies its expertise to administer the special political and trust relationship between Native Hawaiians and the United States. In deciding to propose a rule through the notice-and-comment process, the Department applied its expertise in Native Hawaiian affairs and analyzed the written and oral testimony submitted last year as part of the administrative record. The proposed rule, however, is only a proposal, and the Department will receive and consider further public comments before determining whether it should issue a final rule and, if so, what the final rule should say.

### **Why is the Department taking action now?**

The Department believes that reestablishing a formal government-to-government relationship with the Native Hawaiian community would allow the United States to more effectively implement the special political and trust relationship that Congress has established with that community.

We are proposing an administrative rule in response to calls to action from leaders within the Native Hawaiian community, as well as from Hawaii's elected political leaders. Members of the community have requested that the Department take this step for over a decade.

As the lead Federal agency for Native Hawaiian issues, it is within the Department of the Interior's purview and prerogative to consider such matters. Importantly, the overwhelming majority of those who commented on the Advance Notice of Proposed Rulemaking, issued in June 2014, urged us to move forward with a proposed rule that would set out a process for reestablishing formal government-to-government ties to the Native Hawaiian community.

### **What are the benefits associated with reestablishing a government-to-government relationship?**

The Federal government has a longstanding policy of supporting self-determination and self-governance for Native peoples throughout the United States. Such self-government provides many Native populations enhanced economic development and greater ability to preserve their distinctive cultures and traditions.

A government-to-government relationship with the United States can significantly enhance a Native community's ability to exercise self-government by giving a Native government special status under Federal law. For example, if the Native Hawaiian government seeks and obtains a formal relationship with the United States, Federal courts would then accord greater weight to the laws enacted by that Native Hawaiian government and the decisions of the Native Hawaiian courts. That in turn will facilitate and support self-governance by enabling the community to exercise powers of self-government over many issues directly impacting community members. A government-to-government relationship also would provide a Native Hawaiian government with additional abilities to protect its members' interests by filing suit in Federal court.

Moreover, once a government-to-government relationship exists, Federal agencies would treat the Native Hawaiian government as the legal representative of the community. Many Federal agencies have procedures in place for regular communication and consultation with recognized Native governments.

**Does the proposed rule alter the fundamental nature of the political and trust relationship established by Congress between the United States and the Native Hawaiian community?**

No. Over many decades, Congress has enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. These Federal laws help preserve and protect Native Hawaiian culture, language, and historical sites, as well as establish special Native Hawaiian programs in the areas of health care, education, loans, and employment, among others.

**Does the proposed rule have any direct impact on the status of the Hawaiian home lands?**

No. Nothing in the proposed rule, or granting a request submitted under it, would affect the status of Hawaiian Homes Commission Act (HHCA) beneficiaries or Hawaiian home lands.

**Does the proposed rule authorize compensation for past wrongs?**

No. The proposed rule does not authorize or in any way contemplate compensation for any past wrongs.

**What is the impact of the proposed rule on Federal lands in Hawaii?**

The proposed rule makes clear that reestablishment of a formal government-to-government relationship would not affect title, jurisdiction, or status of Federal lands in Hawaii.

**Does the proposed rule determine who ultimately would be a member or citizen of a Native Hawaiian government?**

Under the proposed rule, a Native Hawaiian government would have significant discretion to define its own membership criteria. Under principles of Federal law, however, only persons with Native Hawaiian ancestry could be members if a formal government-to-government relationship is reestablished. The proposed rule also requires that any person who is within Congress's definition of beneficiaries under the HHCA be eligible for membership.

**Will the Secretary reestablish a government-to-government relationship with more than one Native Hawaiian government?**

No. The proposed rule provides that the Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, but that it may include political subdivisions.

The structure of the Native Hawaiian government is left for the community to decide. Should the Native Hawaiian government seek to reestablish a formal government-to-government relationship with the United States, the proposed rule has a short list of requirements for that government's constitution or governing document. For example, the governing document must

provide for periodic elections, guarantee civil rights protections, and protect rights and benefits arising under the HHCA.

**Does the proposed rule determine the process for ratifying a constitution or other governing document in a ratification referendum? Does it limit who would be eligible to vote in a ratification referendum?**

The proposed rule requires that a ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that those who vote are actually eligible to vote. To ensure that the ratification vote reflects the views of the Native Hawaiian community as a whole, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support.

Congress uses two approaches to defining the Native Hawaiian community. The definition appearing in the HHCA requires at least 50 percent Native Hawaiian ancestry; in other statutes, Congress defines the term more broadly, to include any U.S. citizen who descends from the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Because Congress uses both definitions, the proposed rule requires that a majority of voters from each of these groups support the governing document in a ratification referendum. The proposed rule also considers the total number of affirmative votes cast in favor of the governing document to ensure that support is genuinely broad-based. The proposed rule creates a strong presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian. At a minimum, the affirmative votes must exceed 30,000, including affirmative votes from at least 9,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian.

**Would reestablishment of a government-to-government relationship under the proposed rule make the Native Hawaiian government eligible for Federal Indian programs and services?**

No. Congress enacted programs and services expressly and specifically for the Native Hawaiian community that are separate from the programs and services that Congress enacted for federally recognized tribes in the continental United States. Native Hawaiians are therefore not eligible for Federal Indian programs, services, or benefits unless Congress expressly and specifically declares them eligible.

Consistent with that approach, the proposed rule would not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise.

**Will the Department go forward with reestablishing a formal government-to-government relationship if the Native Hawaiian community decides it does not want to do so?**

No. If the community does not support a government-to-government relationship, no such relationship will be reestablished. The proposed rule sets a process under which the Native Hawaiian community can, through a democratic process, request a formal government-to-government relationship with the United States if the community chooses. Because the proposal provides for a referendum, broad-based community support will be a precondition for reestablishing a government-to-government relationship.

**Would the proposed rule make a Native Hawaiian government eligible to invoke the Indian Gaming Regulatory Act (IGRA)?**

No. The Department anticipates that IGRA would not apply to the Native Hawaiian government. Furthermore, because Hawaii state law prohibits gambling, the Native Hawaiian government would not be permitted to conduct gaming in Hawaii.

**Has the Obama Administration previously supported reestablishment of a government-to-government relationship with the Native Hawaiian community?**

Yes. The Obama Administration has a strong commitment to enhancing principles of self-determination and self-governance for Native communities, including Native Hawaiians. Notably, in 2010, Secretary of the Interior Salazar and Attorney General Holder sent Congress a letter strongly supporting legislation to reorganize a Native Hawaiian government to which the United States could relate on a government-to-government basis.

**Who can submit public comments on the proposed rule?**

Anyone may comment on the proposed rule. We are particularly interested in hearing from leaders and members of the Native Hawaiian community and of federally recognized tribes in the continental United States. We also welcome comments and information from the State of Hawaii and its agencies, other government agencies, and members of the public.

**What types of public comments are being solicited?**

We are seeking comments on the contents of the proposed rule. We welcome all comments from the public, but comments that deal directly with the proposal are most helpful.

The proposed rule has three subparts: General provisions (Subpart A); Criteria for reestablishing a formal government-to-government relationship (Subpart B); and Process for reestablishing a formal government-to-government relationship (Subpart C). Generally, Subpart B sets out the elements required in a request to reestablish a formal government-to-government relationship with the United States and the criteria the Secretary would use to review the request. Subpart C details the process for reestablishing a formal government-to-government relationship, including public comment on the request, and the implementation of that relationship.

The preamble to the proposed rule contains background information on aspects of the proposed rule, responds to comments received on the Advance Notice of Proposed Rulemaking, and summarizes the Department's approach to developing the proposed rule. We welcome comment on that discussion as well.

**Will there be public meetings or consultations to discuss the proposed rule?**

Yes. We will conduct four meetings by teleconference: two will be open to the public and the other two will target comments from Native Hawaiian organizations and federally recognized tribes in the continental United States. Details for each teleconference are listed below:

*Public Meeting*

Monday, October 26, 2015

2:00 pm – 5:00 pm Eastern Time / 8:00 am – 11:00 am Hawaii Time

Call-in number: 1-888-947-9025

Passcode: 1962786

*Native Hawaiian Organizations Meeting\**

Tuesday, October 27, 2015

3:00 pm – 6:00 pm Eastern Standard Time / 9:00 am – 12:00 pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

*Tribal Consultation*

Wednesday, November 4, 2015

1:30 pm – 4:30 pm Eastern Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

*Public Meeting*

Saturday, November 7, 2015

3:00 pm – 6:00 pm Eastern Standard Time / 9:00 am – 12:00 pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

*\*Limited to organizations listed on the Native Hawaiian Organization Notification list, available at [www.doi.gov/ohr/nholist/nhol](http://www.doi.gov/ohr/nholist/nhol). Please RSVP to [RSVPpart50@doi.gov](mailto:RSVPpart50@doi.gov) for this meeting only. No RSVP is necessary for the other meetings.*

This information is also available at [www.doi.gov/ohr](http://www.doi.gov/ohr) and printed in the *Federal Register*.

We strongly encourage Native Hawaiian organizations and federally recognized tribes in the continental United States to hold their own meetings to develop comments on the issues outlined in the proposed rule and to submit them to us for the record.

**Once the public comment period on the proposed rule closes, what are the next steps in the rulemaking process?**

The public comment period for the proposed rule will last 90 days. The Department will then review and analyze those comments along with the testimony received during the scheduled teleconferences to determine if a final rule should issue.